APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-687

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 8, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-687

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN AND PIPE COMPANY, AND EMSCO SCREEN AND PIPE COMPANY OF TEXAS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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[1] (The Opinion and the Judgment of the court of appeals and the Judgment of the district court are printed as appendices to the petition for a writ of certiorari filed in this case and will not be reprinted in this Appendix.)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2/ 8/72	Complaint. filed. (1) summons issued.
2/17/72	Summons Ret. & filed. Ex. 2/14/72.
3/ 1/72	Defts.' ANSWER. filed.
4/14/72	Plf.'s Motion for leave to file amended complaint. filed. (no objection)
4/17/72	Amended Complaint. filed.
5/29/73	(P.T.Fay) Pre-Trial Order, filed.
5/29/73	Stipulations, filed.
5/29/73	Trial Brief for the Plaintiff, filed.
5/29/73	Trial Brief for the Defendants, filed.
5/29/73	Proposed Conclusions of Law, filed.
5/20/73	(P.T.Fay) Final Judgment, filed and entered.
7/23/73	Deft's Notice of Appeal, filed (Copy mailed to Plff)
7/23/73	Cost Bond on Appeal, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed Feb. 8, 1972, Clerk, U.S. District Court, Southern District of Texas. V. Bailey Thomas, Clerk. By Deputy E. Knoblauch]

Civil Action No. 72-H-164

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR THE EMSCO SCREEN PIPE COMPANY OF TEXAS, INC.; EMSCO SCREEN PIPE CO. OF TEXAS, INC., DEFENDANTS

COMES NOW the United States of America, Plaintiff herein, and sues Thomas W. Moore, Jr., Esquire, assignee for the benefit of creditors for the Emsco Screen Pipe Company of Texas, Inc., and also sues Emsco Screen Pipe Company of Texas, Inc., a corporation; and alleges:

COUNT I

1. That this is an action brought by the United States of America for and on behalf of the Department of the Navy, an agency and instrumentality of the United States; and jurisdiction is founded in Title 28 U.S.C. § 1345;

2. That the Defendant, Thomas W. Moore, Jr., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

3. That the Defendant, Emsco Screen and Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

4. That, under the terms of the contract NOO197-66-C-0432, dated June 9, 1966, the Defendant Emsco agreed to furnish the Department of the Navy shield assemblies and fabricated items at a total contract price of $210,-231.18 with deliveries to commence in October, 1966, and final delivery to be completed by June, 1967;

5. That notwithstanding the above terms, the Defendant Emsco made no delivery of said material to the Navy as required by the contract; thereby breaching said contract;

6. That, as a consequence of the Defendant Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on August 31, 1966;

7. That, as a result of the termination for default, the Plaintiff reprocured the said contract on November 23, 1966, wherein Emsco became indebted to the Plaintiff in the sum of $40,607.13 representing excess costs of repurchase of said materials, plus 6% interest per annum from December 1, 1966;

8. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditors obligations, made a voluntary assignment for the benefit of creditors to the Defendant, Thomas W. Moore, Jr., and that Defendant Moore is presently the voluntary assignee for the benefit of creditors;

9. That the administrative appeal on this contract (ASBCA 11917 and 12184) has been dismissed with prejudice to the Defendant Emsco;

10. That the Defendants Moore and Emsco have sufficient funds to pay the sum alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. §§ 191 and 192.

11. That, although requested to do so, the Defendants Emsco and Moore have failed and refused to pay the sum alleged hereinabove, or any part thereof, for which they are justly indebted;

WHEREFORE, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $40,607.13 with interest thereon at the rate of

6% per annum from December 1, 1966, until paid; and, for such other relief to which Plaintiff may be entitled including costs;

2. Judgment against Defendant, Thomas W. Moore, Esquire, assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the sum of $40,607.13 with interest thereon at the rate of 6% per annum from December 1, 1966, until paid; and, for such other relief to which Plaintiff may be entitled, including costs;

COUNT II

12. That this action brought by the United States of America for and on behalf of the Defense General Supply Agency, an agency and instrumentality of the United States; and jurisdiction is founded on Title 28, U.S.C. § 1345.

13. That the Defendant, Thomas W. Moore, Jr., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

14. That the Defendant Emsco Screen Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

15. That, under the terms of the contract, No. DSA-400-66-C-0751/TM540 dated June 14, 1966, the Defendant Emsco agreed to furnish the Defense General Supply Center, 390 BN, FSN 3990-223-6529 at $92.87 each and 483 BN, FSN 3990-291-8717 at $75.40 each, pallet, material handling on or before August 25, 1966 for a total price of $72,637.50;

16. That notwithstanding the above terms, the Defendant Emsco made no delivery of said materials to the Plaintiff as required by the contract, thereby breaching said contract;

17. That, as a consequence of the Defendant's Emsco's failure and refusal to comply with and abide by the

terms of the agreement, the contract was terminated on October 19, 1966;

18. That, as a result of the termination for default, the Defendant became indebted to the Plaintiff in the amount of $8,436.06 representing excess costs of repurchase of said materials;

19. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant, Thomas W. Moore, Jr.;

20. That on August 19, 1968 Defendant Moore and Plaintiff executed a settlement agreement in the amount of $6,072.82 a true copy of which is attached herein and marked Plaintiff's Exhibit "A".

21. That pursuant to said settlement agreement, the named parties therein mutually agreed that the liability owed to the Plaintiff under the aforesaid contract is $6,706.82;

22. That the administrative appeal on this contract (ASBCA 12284) has been dismissed with prejudice to the Defendant Emsco;

23. That the Defendants Moore and Emsco have sufficient funds to pay the sum agreed to under the terms of the said settlement agreement alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. § 191 and 192.

24. That although requested to do so, the Defendants Moore and Emsco have failed and refused to pay the agreed settlement amount alleged hereinabove, or any part thereof for which they are justly indebted;

WHEREFORE, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $6,706.82; and, for such other relief to which Plaintiff may be entitled, including costs;

2. Judgment against Defendant, Thomas W. Moore, Esquire, assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession suffi-

cient to satisfy Plaintiff's claim in the sum of $6,706.82; and, for such other relief to which Plaintiff may be entitled, including costs;

COUNT III

25. That this is an action brought by the United States of America for and on behalf of the Department of the Army, an agency and instrumentality of the United States; and jurisdiction is founded on Title 28, U.S.C. § 1345;

26. That the Defendant, Thomas W. Moore, Jr., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

27. That the Defendant Emsco Screen and Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

28. That, under the terms of the contract, No. DA23-195-AMC-01073(T) dated June 8, 1966, the Defendant Emsco agreed to furnish the Department of the Army 400 each of FSN 5420-542-4722 Curb Deck assembly on or before December 5, 1966, for a total price of $27,-428.00;

29. That notwithstanding the above terms, the Defendant Emsco made no delivery of said materials to the Plaintiff as required by the contract, thereby, breaching said contract, insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant Thomas W. Moore, Jr.;

31. That, in making the said assignment, the Defendant Emsco anticipatorily breached the aforesaid contract;

32. That, as a consequence of the Defendant Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on December 6, 1966;

33. That, as a result of the termination for default, the Defendant Emsco became indebted to the Plaintiff in the amount of $4,272.00;

34. That the claim for $4,272.00 by the Plaintiff was amended several times and that the said Defendants, Moore and Emsco agreed upon a settlement with the Plaintiff in the amount of $5,000.00, a true copy of which is attached herein and marked Plaintiff's Exhibit "B";

35. That pursuant to said settlement agreement, the named parties therein mutually agreed that the liability owed to the Plaintiff under the aforesaid contract is $5,000.00;

36. That the administrative appeal on this contract (ASBCA 12179) has been dismissed with prejudice to the Defendant Emsco;

37. That the Defendants Moore and Emsco have sufficient funds to pay the sum agreed to under the terms of the said settlement agreement alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. §§ 191 and 192;

38. That although requested to do so, the Defendants Moore and Emsco have failed and refused to pay the agreed settlement amount alleged hereinabove, or any part thereof, for which they are justly indebted;

WHEREFORE, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $5,000.00; and for such other relief to which Plaintiff may be entitled, including costs;

2. Judgment against Defendant, Thomas W. Moore, Esquire, assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the sum of

$5,000.00; and, for such other relief to which Plaintiff may be entitled, including costs.

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
HELEN M. EVERSBERG
Assistant United States Attorney

Of Counsel:

ROGER C. WESLEY
Trial Attorney
Department of Justice, Civil Division
Washington, D.C. 20530

FSN 3000-223-6529

STANDARD FORM 30, JULY 1966
GENERAL SERVICES ADMINISTRATION
FED. PROC. REG. (41 CFR) 1-16.101

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

PAGE 1 OF 3

1. AMENDMENT/MODIFICATION NO.	2. EFFECTIVE DATE	3. REQUISITION/PURCHASE REQUEST NO.	4. PROJECT NO. (If applicable)
P-004			

5. ISSUED BY CODE

Directorate of Procurement & Production
ATTN: MA343
Defense General Supply Center
Richmond, Virginia 23219

6. ADMINISTERED BY (If other than block 5) CODE

Chief, DCASO
2320 LaBranch Street
Houston, Texas 77004

7. CONTRACTOR NAME AND ADDRESS (Street, city, county, state, and ZIP Code) CODE FACILITY CODE

Emsco Screen Pipe Company
of Texas, Inc.
3 Rick Road
Houston, Texas 77021

8.
☐ AMENDMENT OF SOLICITATION NO. _____,
DATED _____ (See block 9)
☒ MODIFICATION OF CONTRACT/ORDER NO. DSA-400-66-C-0751
DATED 14 June 66 (See block 11)

9. THIS BLOCK APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in block 12. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offerors must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation, or as amended, by one of the following methods: (a) By signing and returning _____ copies of this amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If, by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided such telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

10. ACCOUNTING AND APPROPRIATION DATA (If required)

11. THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

(a) ☐ This Change Order is issued pursuant to _____
The Changes set forth in block 12 are made to the above numbered contract/order.

(b) ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in block 12.

(c) ☒ This Supplemental Agreement is entered into pursuant to authority of 10 USC 2304 (a)
It modifies the above numbered contract as set forth in block 12.

12. DESCRIPTION OF AMENDMENT/MODIFICATION

See pages 2 and 3 of this modification.

JCS

Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect.

13. ☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT ☒ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 3 COPIES TO ISSUING OFFICE

14. NAME OF CONTRACTOR/OFFEROR		17. UNITED STATES OF AMERICA	
BY EMSCO SCREEN PIPE COMPANY OF TEX. INC (Signature of person authorized to sign)		BY _____ (Signature of Contracting Officer)	
15. NAME AND TITLE OF SIGNER (Type or print)	**16. DATE SIGNED**	**18. NAME OF CONTRACTING OFFICER** (Type or print)	**19. DATE SIGNED**
THOMAS W. MOORE, Jr Assignee for benefit of Creditors of	8/19/68	J. S. HARVIE	

EMSCO Screen Pipe Company of Texas, Inc., but not individually

BEST COPY AVAILABLE

9

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SETTLEMENT AGREEMENT

Modification No. P-004
Date: _____
Contract No. DSA-400-66-C-0751/MA343
Rqn. Nos. AT4005 3288 9516-XX, AT6508 5189 3552-XX & AX3836 6030 1499-XX
FSN 3990-223-6529
Allotment Funds: 97X4961.5104 01 0026 S44-073

Emsco Screen Pipe Company of Texas, Inc.
3 Rick Road
Houston, Texas 77021

THIS SETTLEMENT AGREEMENT between the United States of America (hereinafter called "the Government") represented by the Contracting Officer executing this Agreement, and Emsco Screen Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas (hereinafter called "Contractor") represented by Thomas W. Moore, Jr., Esq.. Assignee for the Benefit of Creditors (hereinafter called Assignee),

WITNESSETH THAT:

WHEREAS the Government awarded Contract No. DSA-400-66-C-0751/TM540 to Contractor on 14 June 1966 in the total amount of $72,637.50 and terminated the contract for default in its entirety on 19 October 1966; and

WHEREAS Contractor appealed the termination for default to the Armed Services Board of Contract Appeals, ASBCA No. 12284; and

WHEREAS the Government made demand for the payment of excess costs of repurchase in the total amount of $8,436.06, with interest from 05 January 1967; and

WHEREAS an offer to compromise the Government's claim against Contractor was submitted in the amount of $6,706.82 by telegram of Attorney/Assignee dated 12 January 1968 and accepted by the Government's telegram dated 12 January 1968.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

1. That the liability of the Contractor to the Government under the aforesaid contract is $6,706.82.

4. That upon execution of this Agreement by the parties hereto, either party may request the Board's consent to withdrawal of the appeal, with prejudice, from its docket.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

Date: 68 Aug. 23

UNITED STATES OF AMERICA

BY /s/ J. L. Harris
Contracting Officer
EMSCO SCREEN PIPE COMPANY OF TEXAS, INC.

Date: 8/19/68

BY /s/ Thomas W. Moore
THOMAS W. MOORE
Assignee for the
Benefit of Creditors,
but not individually

Mrs. Compton/rt/NI 3-3311/5 AMSTR-PDO-C 66-290-C

STANDARD FORM 30, JULY 1966
GENERAL SERVICES ADMINISTRATION
FED. PROC. REG. (41 CFR) 1-16.101

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

PAGE 1 OF 2

1. AMENDMENT/MODIFICATION NO.	2. EFFECTIVE DATE	3. REQUISITION/PURCHASE REQUEST NO.	4. PROJECT NO. (If applicable)
P0001	1 Apr 68	[illegible]	

5. ISSUED BY [illegible]-PDO-C CODE
U. S. Army Mobility Equipment Command
Directorate of Procurement & Production
4300 Goodfellow Boulevard
St. Louis, Missouri 63120

6. ADMINISTERED BY (If other than block 5) CODE
Defense Contract Administration Services Office,
Houston
P. O. Box 61167
Houston, Texas 77061

7. CONTRACTOR NAME AND ADDRESS (Street, city, county, state, and ZIP Code) CODE FACILITY CODE

Thomas W. Moore
Assignee for Benefit of Creditors
Emsco Screen Pipe Co. of Texas, Inc.
Houston, Texas 77021

8.
☐ AMENDMENT OF SOLICITATION NO. _____
DATED _____ (See block 9)
☒ MODIFICATION OF DA CONTRACT/ORDER NO. DA-23-195-AMC-01073(T)
DATED 8 June 1966 (See block 11)

9. THIS BLOCK APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in block 12. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offerors must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation, or as amended, by one of the following methods: (a) By signing and returning _____ copies of this amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If, by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided such telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

10. ACCOUNTING AND APPROPRIATION DATA (If required)
21X2030 66D-5070 PH730-31 S23-195 Supplies
21X2030 66D-5070 PH730-22 S23-195 Transportation

11. THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

(a) ☐ This Change Order is issued pursuant to _____
The Changes set forth in block 12 are made to the above numbered contract/order.

(b) ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in block 12.

(c) ☒ This Supplemental Agreement is entered into pursuant to authority of 10 U.S.C. 2304(a)(1)
It modifies the above numbered contract as set forth in block 12.

12. DESCRIPTION OF AMENDMENT/MODIFICATION

WHEREAS Supply Contract No. DA-23-195-AMC-01073 was awarded to Emsco Screen Pipe Company of Texas, Inc., hereinafter referred to as EMSCO, by the United States of America, hereinafter referred to as the Government, on 8 June 1966;

WHEREAS a general Assignment for the Benefit of Creditors was made by EMSCO on 20 October 1966, to Thomas W. Moore, Jr. as Assignee for Benefit of Creditors;

WHEREAS the aforesaid contract was terminated by the Government for default on 6 December 1966;

WHEREAS the Government contends a repurchase and reprocurement was effected on 9 June 1967, which resulted in $5,952.00 excess costs;

WHEREAS a demand was made by the Government on 21 July 1967, for payment of the aforesaid sum;

WHEREAS the Assignee for Benefit of Creditors contends that EMSCO does not owe the Government for excess costs under the aforesaid contract and that such contract should have been terminated for the convenience of the Government;

Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect.

13.
☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT
☒ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 6 COPIES TO ISSUING OFFICE

14. NAME OF CONTRACTOR/OFFEROR	17. UNITED STATES OF AMERICA
BY Assignee for Benefit of Creditors of Emsco Screen Pipe Co. of Texas, Inc. (Signature of person authorized to sign)	BY _____ (Signature of Contracting Officer)
15. NAME AND TITLE OF SIGNER (Type or print): Thomas W. Moore, Assignee	16. DATE SIGNED: 3/26/68
18. NAME OF CONTRACTING OFFICER (Type or print): G. A. O'NEILL	19. DATE SIGNED

30-101-01

☆ U.S. GOVERNMENT PRINTING OFFICE: 1967—244-063

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CONTINUATION SHEET

Contract DA-23-195-AMC-01073(T)
Mod P0001
Page 2 of 2 Pages

WHEREAS an appeal was filed and is now pending before the Armed Services Board of Contract Appeals as case No. 12179;

WHEREAS the amount of the liability of EMSCO to the Government is uncertain and unliquidated;

WHEREAS Thomas W. Moore, Jr., Assignee, duly represents the contractor;

WHEREAS both parties, EMSCO and the Government desire to settle the aforesaid disputed claim;

NOW, THEREFORE, in consideration of the premises it is mutually agreed;

1. That EMSCO is liable to the Government on Contract No. DA-23-195-AMC-01073 in the amount of $5,000.00.

2. That the Contracting Officer on behalf of the Government acknowledges said sum as now due and owing from EMSCO to the Government and accepts said amount as full, complete and final settlement of said claim and appeal.

3. That said settlement applies to the claim arising from Contract No. DA-23-195-AMC-01073 only, and does not pertain to any other claim or claims the Government may now possess or which may arise in the future.

4. The parties acknowledge that said sum is an adjusted figure and amount and the assignee agrees that he or his successor assignee will not contest the amount of EMSCO's liability herein above stated in any insolvency proceeding, STATE or FEDERAL.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action File No. 72-H-164

[Filed Mar. 1, 1972, Clerk U.S. District Court, Southern District of Texas. V. Bailey Thomas, Clerk. By Deputy: E. Knoblauch]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., ETC., DEFENDANT

ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

The defendants, Thomas W. Moore, Jr., Esquire, Assignee for the Benefit of Creditors of Emsco Screen Pipe Company of Texas, Inc. (Defendant Moore) and Emsco Screen Pipe Company of Texas, Inc., a corporation, (Defendant Emsco), for their answer say as follows:

I.

As to Count I, defendants admit the allegations in paragraphs 1 through 6, 8 and 9, and deny the allegations in paragraphs 7, 10 and 11, and deny that plaintiff should be afforded the relief requested. As to the allegations in paragraph 7, defendants admit the reprocurement on November 23, 1966, with excess cost of repurchase in the sum of Forty Thousand Six Hundred Seven and 13/100 Dollars ($40,607.13), but deny indebtedness to plaintiff at that time because of bona fide disputes between Emsco and plaintiff as to Emsco's right to a termination for convenience of the Government. Such disputes were finally resolved against Emsco on May 29,

1969, by the decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 11917 and 12184. No further appeal has been prosecuted.

II.

As to Count II, defendants admit the allegations in paragraphs 12 through 17, and 19 through 22, and deny the allegations in paragraphs 18, 23 and 24, and deny that plaintiff should be afforded the relief requested. As to paragraph 18, defendants admit the excess cost of repurchase was Eight Thousand Four Hundred Thirty-Six and 06/100 Dollars ($8,436.06), but deny the defendants were indebted to plaintiff in that amount because of bona fide disputes between Emsco and plaintiff as to Emsco's liability. Such disputes were not resolved until the execution of the settlement agreement attached as an exhibit to plaintiff's complaint.

III.

As to Count III, defendants admit the allegations in paragraphs 25 through 28, 31, 32 and 35 through 36; defendants deny the allegations in paragraphs 29 and 30, which cannot be understood because of portions inadvertently omitted; defendants deny the allegations in paragraph 33, 34, 37 and 38; and defendants deny that plaintiff should be afforded the relief requested. As to paragraphs 33, 34, 37 and 38; and defendants deny that tiff at the time of the termination for default because of bona fide disputes between plaintiff and Emsco. As to paragraph 34, defendants state on information and belief that the excess costs of repurchase were in the amount of Five Thousand Nine Hundred Fifty-two and no/100 Dollars ($5,952.00), instead of Four Thousand Two Hundred Seventy-two and no/100 Dollars ($4,-272.00) as complained by plaintiff; defendants admit the execution of the settlement agreement with plaintiff in the amount of Five Thousand Dollars ($5,000.00) on March 26, 1968.

IV.

By way of further answer, Defendant Moore asserts that plaintiff is not entitled to priority of payment because in all cases the amounts claimed due from Emsco were not "debts due" to the United States within the meaning of 31 USC § 191. Such claims were disputed and unliquidated at the time of the Assignment for the Benefit of Creditors of Emsco. Any order of distribution issued by this court should provide that plaintiff should receive only its pro rata share of the distributable assets.

WHEREFORE, PREMISES CONSIDERED, defendants pray that plaintiff's claim be denied; that defendants recover all costs of court; and for such other and further relief, general or special, at law or in equity, to which defendants, or either of them, may be justly entitled.

Respectfully submitted,

MOORE, HARRIS & Co.

By /s/ Thomas Osa Harris
THOMAS OSA HARRIS
2000 West Loop South, Suite 1560
Houston, Texas 77027
713-621-4501

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 72-H-164

[Filed Apr. 14, 1972, Clerk, U.S. District Court, Southern District of Texas. V. Bailey Thomas, Clerk. By Deputy: E. Knoblauch]

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR THE EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., DEFENDANT

MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT

COMES NOW the United States of America, by and through the United States Attorney for the Southern District of Texas, and moves this Court to grant leave to the United States to file an amended Complaint for the reason that, by an inadvertent error, paragraph 30 of the Original Complaint filed with this Court was deleted, and the United States would request permission to include paragraph 30 in its Complaint. Defendant's attorney has stated *that he has no objection.*

THEREFORE, the Plaintiff, United States, prays the Court to grant its leave to file an amended Complaint.

Respectfully submitted,

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
HELEN M. EVERSBERG
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was sent by certified mail, return receipt requested, to Thomas O. Harris, 1560 Control Data Bldg., 2000 West Loop South, Houston, Texas, on the 14th day of April, 1972.

/s/ Helen M. Eversberg
HELEN M. EVERSBERG
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 72-H-164

[Filed Apr. 17, 1972, Clerk, U.S. District Court, Southern District of Texas. V. Bailey Thomas, Clerk. By Deputy: E. Knolbauch]

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR THE EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., EMSCO SCREEN PIPE CO. OF TEXAS, INC., DEFENDANT

AMENDED COMPLAINT

COMES NOW the United States of America, Plaintiff herein, and sues THOMAS W. MOORE, JR., Esquire, assignee for the benefit of creditors for the Emsco Screen Pipe Company of Texas, Inc., and also sues Emsco Screen Pipe Company of Texas, Inc., a corporation; and alleges.

COUNT I

1. That this is an action brought by the United States of America for and on behalf of the Department of the Navy, an agency and instrumentality of the United States; and jurisdiction is founded in Title 28, U.S.C. § 1345;

2. That the Defendant, THOMAS W. MOORE, JR., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

3. That the Defendant, Emsco Screen and Pipe Company of Texas, Inc., a corporation organized and exist-

ing under the laws of the State of Texas is within the jurisdiction of this Court;

4. That, under the terms of the contract NOO197-66-c-0432, dated June 9, 1966, the Defendant Emsco agreed to furnish the Department of the Navy shield assemblies and fabricated items at a total contract price of $210,-231.18 with deliveries to commence in October, 1966, and final delivery to be completed by June, 1967;

5. That notwithstanding the above terms, the Defendant Emsco made no delivery of said material to the Navy as required by the contract; thereby breaching said contract;

6. That, as a consequence of the Defendant Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on August 31, 1966;

7. That, as a result of the termination for default, the Plaintiff reprocured the said contract on November 23, 1966, wherein Emsco became indebted to the Plaintiff in the sum of $40,607.13 representing excess costs of repurchase of said materials, plus 6% interest per annum from December 1, 1966;

8. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant, THOMAS W. MOORE, JR., and that Defendant Moore is presently the voluntary assignee for the benefit of creditors;

9. That the administrative appeal on this contract (ASBCA 11917 and 12184) has been dismissed with prejudice to the Defendant Emsco;

10. That the Defendants Moore and Emsco have sufficient funds to pay the sum alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. §§ 191 and 192.

11. That, although requested to do so, the Defendants Emsco and Moore have failed and refused to pay the sum alleged hereinabove, or any part thereof, for which they are justly indebted;

Wherefore, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $40,607.13 with interest thereon at the rate of 6% per annum from December 1, 1966, until paid; and, for such other relief to which Plaintiff may be entitled, including costs;

2. Judgment against Defendant, THOMAS W. MOORE, Esq., assignee for the bentfit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the sum of $40,607.13 with interest thereon at the rate of 6% per annum from December 1, 1966, until paid; and, for such other relief to which Plaintiff may be entitled, including costs;

COUNT II

12. That this action brought by the United States of America for and on behalf of the Defense General Supply Agency, an agency and instrumentality of the United States; and jurisdiction is founded on Title 28, U.S.C. § 1345.

13. That the Defendant, THOMAS W. MOORE, JR., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

14. That the Defendant Emsco Screen Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

15. That, under the terms of the contract, No. DSA-400-66-C-0751/TM540 dated June 14, 1966, the Defendant Emsco agreed to furnish the Defense General Supply Center, 390 BN, FSN 3990-223-6529 at $92.87 each and 483 BN, FSN 3990-291-9717 at $75.40 each, pallet, material handling on or before August 25, 1966 for a total price of $72,637.50, which total price was subsequently reduced to $71,637.50;

16. That notwithstanding the above terms, the Defendant Emsco made no delivery of said materials to the

Plaintiff as required by the contract, thereby breaching said contract;

17. That, as a consequence of the Defendant's Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on October 19, 1966;

18. That, as a result of the termination for default, the Defendant became indebted to the Plaintiff in the amount of $8,436.06 representing excess costs of repurchase of said materials;

19. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant, THOMAS W. MOORE, JR.;

20. That on August 19, 1968, Defendant Moore and Plaintiff executed a settlement agreement in the amount of $6,072.82 a true copy of which is attached herein and marked Plaintiff's Exhibit A.

21. That pursuant to said settlement agreement, the named parties therein mutually agreed that the liability owed to the Plaintiff under the aforesaid contract is $6,706.82;

22. That the administrative appeal on this contract (ASBCA 12284) has been dismissed with prejudice to the Defendant Emsco;

23. That the Defendants Moore and Emsco have sufficient funds to pay the sum agreed to under the terms of the said settlement agreement alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. § 191 and 192.

24. That although requested to do so, the Defendants Moore and Emsco have failed and refused to pay the agreed settlement amount alleged hereinabove, or any part thereof for which they are justly indebted;

Wherefore, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $6,706.82; and, for such other relief to which Plaintiff may be entitled, including costs;

2. Judgment against Defendant, THOMAS W. MOORE, JR., Esq., assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the sum of $6,706.82; and, for such other relief to which Plaintiff may be entitled, including costs;

COUNT III

25. That this is an action brought by the United States of America for and on behalf of the Department of the Army, an agency and instrumentality of the United States; and jurisdiction is founded on Title 28, U.S.C. § 1345;

26. That the Defendant, THOMAS W. MOORE, JR., assignee for the benefit of creditors, is now residing in Houston, State of Texas, and within the jurisdiction of this Court;

27. That the Defendant Emsco Screen Pipe Company of Texas, Inc., a corporation organized and existing under the laws of the State of Texas is within the jurisdiction of this Court;

28. That, under the terms of the contract, No. DA23-195-AMC-01073(T) dated June 8, 1966, the Defendant Emsco agreed to furnish the Department of the Army 400 each of FSN 5420-542-4722 Curb Deck assembly on or before December 5, 1966, for a total price of $27,428.00;

29. That notwithstanding the above terms, the Defendant Emsco made no delivery of said materials to the Plaintiff as required by the contract, thereby, breaching said contract;

30. That on October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant THOMAS W. MOORE, JR.;

31. That, in making the said assignment, the Defendant Emsco anticipatorily breached the aforesaid contract;

32. That, as a consequence of the Defendant Emsco's failure and refusal to comply with and abide by the terms of the agreement, the contract was terminated on December 6, 1966;

33. That, as a result of the termination for default, the Defendant Emsco became indebted to the Plaintiff in the amount of $4,272.00;

34. That the claim for $4,272.00 by the Plaintiff was amended several times and that the said Defendants, Moore and Emsco agreed upon a settlement with the Plaintiff in the amount of $5,000.00, a true copy of which is attached herein and marked Plaintiff's Exhibit B.

35. That pursuant to said settlement agreement, the named parties therein mutually agreed that the liability owed to the Plaintiff under the aforesaid contract is $5,000.00;

36. That the administrative appeal on this contract (ASBCA 12179) has been dismissed with prejudice to the Defendant Emsco;

37. That the Defendants Moore and Emsco have sufficient settlement agreement alleged hereinabove and that the Plaintiff has priority for said amount under Title 31, U.S.C. §§ 191 and 192;

38. That although requested to do so, the Defendants Moore and Emsco have failed and refused to pay the agreed settlement amount alleged hereinabove, or any part thereof, for which they are justly indebted;

Wherefore, Plaintiff demands relief as follows:

1. Judgment against Defendant, Emsco, in the sum of $5,000.00; and for such other relief to which Plaintiff may be entitled including costs;

2. Judgment against Defendant, THOMAS W. MOORE, JR., Esq., assignee for the benefit of creditors for Emsco, ordering the said Defendant to accord priority to Plaintiff's claim pursuant to 31 U.S.C. § 191 and make distribution of assets in his possession sufficient to satisfy Plaintiff's claim in the

sum of $5,000.00; and, for such other relief to which Plaintiff may be entitled, including costs.

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
Assistant United
States Attorney

Of Counsel:

ROGER C. WESLEY
Trial Attorney
Department of Justice,
Civil Division
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 72-H-164

[Filed 5-29-73, V. Bailey Thomas, Clerk, By: M. Prater, Deputy]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE CO. OF TEXAS INC.; EMSCO SCREEN PIPE CO., INC., DEFENDANTS

PRE-TRIAL ORDER

The pre-trial conference was held in the above-entitled action on the 30th day of April, 1973 before the Honorable Ronald J. Blask, United States Magistrate for the Southern District of Texas. Helen M. Eversberg, Assistant United States Attorney, appeared as counsel for plaintiff. Thomas Osa Harris, Esquire, appeared as counsel for defendants.

JURISDICTIONAL QUESTIONS

The parties agree that the Court has full and complete jurisdiction of this action under 28 U.S.C. § 1345.

MOTIONS

There are no motions pending before the Court.

STATEMENT OF THE CASE

In June of 1966 the defendant, Emsco Screen Pipe Company of Texas, Inc., entered into three contracts with the Department of the Navy, Army, and Defense Supply

Agency. The contract with the Navy was terminated by the Navy for the default of Emsco on August 31, 1966. This contract was reprocured on November 23, 1966. The excess costs of reprocurement totaled $40,607.13, plus interest at six percent (6%) from December 1, 1966. This claim was appealed by Emsco to the Armed Services Board of Contract Appeals, and a decision was rendered against Emsco.

The Defense Supply Agency terminated its contract for Emsco's default on October 19, 1966. Subsequently, they reprocured at an excess cost of $8,436.06, which figure was reduced by agreement to $6,072.82 on August 19, 1968, the latter amount presently representing the amount of the Government's claim.

The Army terminated its contract with Emsco for default on December 6, 1966. Thereafter the amount of $5,000 was reached by agreement as the amount of the Government's claim.

On October 20, 1966 the defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit creditors to the defendant Thomas W. Moore, Jr., who continues to be the voluntary assignee.

CONTENTIONS OF THE PARTIES

The United States of America contends that it is entitled to the full amount of its claims against Emsco by virtue of the priority accorded the Government under the Federal insolvency statute (31 U.S.C. § 191). The United States further contends that its claims against Emsco were sufficiently liquidated to come within the meaning of the Federal insolvency statute.

The defendants assert that the United States is entitled only to its pro rata share of the assets held by the assignee, and that the claims of the Government were not sufficiently liquidated so as to give the United States a priority under 31 U.S.C. § 191 for the full amount of its claims.

FACTS

The parties herein have entered into a Stipulation of Facts, and therefore there are no contested issues of fact. A copy of said Stipulation is attached hereto and made a part hereof, and contains the facts upon which the parties are presenting this matter to the Court.

CONTESTED ISSUES OF LAW

A. Whether the claims of the Government were sufficiently liquidated at the time of defendant Emsco's assignment for the benefit of creditors to be a "debt" within the meaning of 31 U.S.C. § 191.

B. Whether the United States is entitled to absolute priority over other creditors by virtue of 31 U.S.C. § 191 to the funds now held by the assignee for the benefit of creditors.

EVIDENCE

The parties will offer jointly in evidence all the exhibits referred to in the parties' Stipulation of Facts. There are no contested exhibits.

WITNESSES

No witnesses will be called by either party.

TRIAL

The parties, having stipulated the facts herein, submit this cause on briefs and, at the pleasure of the Court, on oral argument

This matter has been set for trial for Monday, May 28, 1973 at 9:30 o'clock a.m. (at which time all counsel shall appear) or as soon thereafter as the business of the Court will allow.

APPROVAL RECOMMENDED:

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
HELEN M. EVERSBERG
Assistant United States Attorney

/s/ Roger C. Wesley
ROGER C. WESLEY
Civil Division, Department of Justice
Attorneys for Plaintiff

/s/ Thomas Osa Harris
THOMAS OSA HARRIS
Attorney for Defendants

/s/ Peter T. Fay
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 72-H-164

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS W. MOORE, ESQUIRE, ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR THE EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., EMSCO SCREEN PIPE COMPANY OF TEXAS, INC., DEFENDANTS

STIPULATIONS

Now come the parties and agree that the above numbered cause may be submitted to the court upon the following stipulations.

I.

In June, 1966, the defendant Emsco entered into a contract with the Department of the Navy (NOO 197-066-0432) under which Emsco agreed to furnish the Navy certain shield assemblies and fabricated items at a total contract price of $210,231.18 with deliveries to commence in October, 1966, and final delivery to be completed by June, 1967. The contract was terminated by the Navy on August 31, 1966 and default by Emsco was declared for refusing to comply with the delivery terms of the agreement. The Navy reprocured the said contract on November 23, 1966. The excess costs of reprocurement totalled $40,607.13, with interest running at six percent per annum from December 1, 1966.

II.

On June 8, 1966, Emsco entered into a contract with the Department of the Army (No. DA23-195-AMC-01073 (T)) under which Emsco was to furnish the Army 400 each of FSN 5420-542-4722 Curb Deck assemblies on or

before December 5, 1966, for a total price of $27,428.00. The defendant Emsco made no delivery of the materials designated, thereby breaching its contract. For the refusal to comply with the terms of the contract, the Army terminated the contract on December 6, 1966, leaving a claim of $4,272.00. After several amendments to the claim, a settlement agreement was entered into by the parties on March 26, 1968, providing for liability of $5,000.00. A true copy of such settlement agreement is attached as Exhibit "A". Although the Army contract was not officially terminated until December 6, 1966, Emsco had repudiated the contract in August, 1966. The Army notified Amsco on August 21, 1966 of its intention to treat the contract as terminated.

III.

On June 14, 1966, Emsco entered into a contract with the Defense Supply Agency (No. DSA-400-66-C-0751/TM540) under which Emsco was to furnish Defense Supply certain pallets, designated as 390 BN, FSN 3990-233-6529 at $92.87 each and 483 BN, FSN 3990-291-8717 at $75.40 each, to be delivered on or before August 25, 1966, for a total price of $72,637.50. None of these items were delivered, creating a material breach by Emsco and causing the Defense Supply Agency to terminate the said contract on October 19, 1966. As a result of the default, on January 7, 1967, the Defense Supply reprocured at a cost of $8,436.06, the amount representing the excess costs of repurchasing the materials. By virtue of a subsequent settlement agreement on August 19, 1968 between the parties, the amount of the claim was reduced to $6,072.82. A true copy of such settlement agreement is attached as Exhibit "B".

IV.

All of the above claims were subsequently appealed and dismissed with prejudice to the Defendant, Emsco. (See Armed Services Board of Contract Appeals 11917 and 12184 for dismissal of Navy claims Armed Services Board of Contract Appeals 12179 for dismissal of Army

claims, the Armed Services Board of Contract Appeals 12284 for dismissal of Defense Supply Agency claims).

V.

On October 20, 1966, the Defendant Emsco, with insufficient assets to satisfy all of its creditor obligations, made a voluntary assignment for the benefit of creditors to the Defendant, Thomas W. Moore, Jr., who continues to be the voluntary assignee for the benefit of Emsco's creditors. While two of the claims (Navy and Defense Supply) were already terminated for default prior to the said assignment, the Army claim was not terminated until December 6, 1966. All of Plaintiff's claims were finalized as to the exact amounts after the aforesaid assignment—the Navy's on November 23, 1966, by reprocurement, the Army's on March 26, 1968, by agreement of the parties and the Defense Supply's on August 19, 1968 by agreement of the parties. Emsco contended at the time of termination of the contracts and at the time of the government's claim for excess costs, that it had a right for termination for the convenience of the government. Such disputes were finally resolved by the settlement agreements mentioned above and the decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 11917 and 12184 on May 29, 1969. A true copy of such opinion is attached as Exhibit "C".

VI.

Thomas W. Moore, Jr., as assignee for benefit of creditors of the Defendant, Emsco, has available for distribution to the creditors of the Defendant, Emsco, the amount of $55,707.28 plus interest from January 1, 1969 at the approximate rate of four and one half percent per annum, less $2,500.00 paid for bond premiums and $390.00 paid for warehouse charges. In the interest of certainty, it is agreed that a judgment will be entered in favor of the United States and against Thomas W. Moore, Jr. on a portion of such $55,707.38 as determined by the Court, without prejudice to the right of the United States government to receive additional sums from such assignee

on final distribution. It is further agreed that the United States government will make no attempt to execute or levy on such judgment until all avenues of appeal have been exhausted, and no supersedeas bond will be required It is understood and agreed that interest on such amounts earned by the assignee shall be used for administrative expenses indicated above and reasonable administrative expenses of litigating the question of the priority of the United States government and reasonable administrative expenses of distributing the assets of Emsco to its creditors, including the United States government.

The total claim of the United States herein is $67,-313.70, including interest to June 1, 1973 in regard to the Navy contract. In addition to the claim of the United States, Emsco owes $5,992.73 plus six percent interest from January 7, 1970 to the City of Houston and $68,-758.91 to creditors consenting under the assignment for benefit of creditors. A conformed copy of the judgment in favor of the City of Houston is attached as Exhibit "D".

VIII.

The court may consider these stipulations and the attached exhibits as evidence in this cause. The court may consider the attached opinion of the Armed Services Board of Contract Appeals as a true account of the facts and circumstances of Emsco at the time of the termination of the contract with the Department of the Navy and the contentions made by Emsco concerning its right

for termination for the convenience of the government without excess costs.

Signed this 28th day of May, 1973.

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ Helen M. Eversberg
Assistant United
States Attorney
Attorneys for Plaintiff
MOORE, HARRIS & Co.

By: /s/ Thomas Osa Harris
THOMAS OSA HARRIS
Attorneys for Defendants

Mrs. Compton/rt/X1 3-3311/5 AMDT-PDO-C 66-290-C

STANDARD FORM 30, JULY 1966 GENERAL SERVICES ADMINISTRATION FPR. 7DOC. REG. (41 CFR) 1-16.101

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

PAGE 1 OF 2

1. AMENDMENT/MODIFICATION NO.	2. EFFECTIVE DATE	3. REQUISITION/PURCHASE REQUEST NO.	4. PROJECT NO. (If applicable)
P0001	1 Apr 68	W[illegible]-23-195-[illegible]	

5. ISSUED BY [illegible]-PDO-C CODE

U. S. Army Mobility Equipment Command
Directorate of Procurement & Production
4300 Goodfellow Boulevard
St. Louis, Missouri 63120

6. ADMINISTERED BY (If other than block 5) CODE

Defense Contract Administration Services Office, Houston
P. O. Box 61167
Houston, Texas 77061

7. CONTRACTOR NAME AND ADDRESS (Street, city, county, state, and ZIP Code) CODE FACILITY CODE

Thomas W. Moore
Assignee for Benefit of Creditors
Emsco Screen Pipe Co. of Texas, Inc.
Houston, Texas 77021

8. ☐ AMENDMENT OF SOLICITATION NO. _____ DATED _____ (See block 9)

☒ MODIFICATION OF CONTRACT/ORDER NO. DA 23-195-[illegible]-01073(Z) DATED 8 June 1966 (See block 11)

9. THIS BLOCK APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in block 12. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offerors must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation, or as amended, by one of the following methods: (a) by signing and returning _____ copies of this amendment; (b) by acknowledging receipt of this amendment on each copy of the offer submitted; or (c) by separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If, by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

10. ACCOUNTING AND APPROPRIATION DATA (If required)

21X2030 66D-3070 Pl730-31 S23-195 Supplies
21X2030 66D-3070 Pl730-22 S23-195 Transportation

11. THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

(a) ☐ This Change Order is issued pursuant to _____
The Changes set forth in block 12 are made to the above numbered contract/order.

(b) ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in block 12.

(c) ☒ This Supplemental Agreement is entered into pursuant to authority of 10 U.S.C. 2304(a)(1)
It modifies the above numbered contract as set forth in block 12.

12. DESCRIPTION OF AMENDMENT/MODIFICATION

WHEREAS Supply Contract No. DA-23-195-[illegible]-01073 was awarded to Emsco Screen Pipe Company of Texas, Inc., hereinafter referred to as EMSCO, by the United States of America, hereinafter referred to as the Government, on 8 June 1966;

WHEREAS a general Assignment for the Benefit of Creditors was made by EMSCO on 20 October 1966, to Thomas W. Moore, Jr. as Assignee for Benefit of Creditors;

WHEREAS the aforesaid contract was terminated by the Government for default on 6 December 1966;

WHEREAS the Government contends a repurchase and reprocurement was effected on 9 June 1967, which resulted in $5,952.00 excess costs;

WHEREAS a demand was made by the Government on 21 July 1967, for payment of the aforesaid sum;

WHEREAS the Assignee for Benefit of Creditors contends that EMSCO does not owe the Government for excess costs under the aforesaid contract and that such contract should have been terminated for the convenience of the Government;

Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect.

13. ☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT ☒ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 6 COPIES TO ISSUING OFFICE

14. NAME OF CONTRACTOR/OFFEROR	17. UNITED STATES OF AMERICA
BY Assignee for Benefit of Creditors of Emsco Screen Pipe Co. of Texas, Inc. (Signature of person authorized to sign)	BY _____ (Signature of Contracting Officer)
15. NAME AND TITLE OF SIGNER (Type or print): Thomas W. Moore, Assignee	16. DATE SIGNED: 3/26/68
18. NAME OF CONTRACTING OFFICER (Type or print): G. A. O'NEILL	19. DATE SIGNED: [illegible]

30-101-01

☆ U.S. GOVERNMENT PRINTING OFFICE: 1967—[illegible]

BEST COPY AVAILABLE

CONTINUATION SHEET

Contract DA-23-195-AMC-01073(T)
Mod P0001
Page 2 of 2 Pages

WHEREAS an appeal was filed and is now pending before the Armed Services Board of Contract Appeals as case No. 12179;

WHEREAS the amount of the liability of EMSCO to the Government is uncertain and unliquidated;

WHEREAS Thomas W. Moore, Jr., Assignee, duly represents the contractor;

WHEREAS both parties, EMSCO and the Government desire to settle the aforesaid disputed claim;

NOW, THEREFORE, in consideration of the premises it is mutually agreed;

1. That EMSCO is liable to the Government on Contract No. DA-23-195-AMC-01073 in the amount of $5,000.00.

2. That the Contracting Officer on behalf of the Government acknowledges said sum as now due and owing from EMSCO to the Government and accepts said amount as full, complete and final settlement of said claim and appeal.

3. That said settlement applies to the claim arising from Contract No. DA-23-195-AMC-01073 only, and does not pertain to any other claim or claims the Government may now possess or which may arise in the future.

4. The parties acknowledge that said sum is an adjusted figure and amount and the assignee agrees that he or his successor assignee will not contest the amount of EMSCO's liability herein above stated in any insolvency proceeding, STATE or FEDERAL.

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
125th JUDICIAL DISTRICT

No. 736,999

THE CITY OF HOUSTON

vs.

EMSCO SCREEN PIPE COMPANY OF TEXAS

FINAL JUDGMENT

BE IT REMEMBERED that on the 10th day of September, 1969, came on to be heard before the Court the above numbered and entitled cause and came the Plaintiff, CITY OF HOUSTON, on behalf of itself and for the HOUSTON INDEPENDENT SCHOOL DISTRICT, and the Defendants EMSCO SCREEN PIPE COMPANY OF TEXAS and THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, came the parties by their attorneys and submitted the matters in controversy to the Court without the intervention of a jury. The pleadings, the evidence and the arguments of counsel having been heard and fully understood, it is the opinion of this Court that the Plaintiff is entitled to judgment against the Defendants;

IT IS THEREFORE, ORDERED, ADJUDGED, and DECREED that the CITY OF HOUSTON do have and recover of and from EMSCO SCREEN PIPE COMPANY OF TEXAS and THOMAS W. MOORE, JR., ASSIGNEE FOR BENEFIT OF CREDITORS OF EMSCO SCREEN PIPE COMPANY OF TEXAS, but not individually, the sum of FIVE THOUSAND NINE HUNDRED NINETY-TWO and 73/100 ($5,992.73) DOLLARS. The judgment is composed of the following amounts.

Taxes due for 1966	$2,050.17
Taxes due for 1967	2,346.51
City Interest & Penalty	551.88
School Board & Interest Penalty	534.17
Attorneys Fees	500.00
TOTAL	$5,992.73

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the personal judgment awarded Plaintiff for each of the "AMOUNTS" set out above shall bear interest from the date hereof at the rate of six per cent per annum until paid for each of which personal judgments let execution issue.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff recover all costs of this suit.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the tax [illegible] payment of the total of said "AMOUNTS", aforesaid, be, [illegible] are hereby, foreclosed as the same existed in favor of the City of Houston and the Houston Independent School District as they [illegible] on the first day of January of each of the years aforesaid on the personal property described as follows, to-wit:

> merchandise, furniture, fixtures, machinery, equipment, and auto,

against the rights, title, interest, liens, and claims of each and all of the said hereinbefore mentioned Defendants or any person or persons claiming under said Defendants by, through, or under any right, title, or interest acquired prior to or during the pendency of this [illegible].

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that an Order of Sale issue directing any sheriff or any constable to seize and sell the property aforesaid as under execution in satisfaction of this judgment, or so much thereof as may be necessary to recover the total amount of taxes, penalties, interest, and costs adjudged to be a lien against it, as provided by law.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that any and all processes shall issue by the clerk of this Court ordering the proper officers to place the purchaser or purchasers, their heirs, executors or assigns in possession of the property so purchased, or any part thereof at the sale provided for in this judgment.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that in no event shall the personal judgments and lien foreclosures provided for herein permit to any extend a double recovery.

SIGNED, RENDERED, and ENTERED this the 7 day of January, 1970.

/s/ Dixon
Judge

APPROVED as to form only

/s/ E. A. Lucas, Jr.
Attorney for Plaintiff, City of Houston (and Houston Independent School District)

APPROVED as to form only

/s/ Thomas Osa Harris
Attorney for the Defendant

ARMED SERVICES BOARD
OF CONTRACT APPEALS

ASBCA Nos. 11917 and 12184

Appeals of—
EMSCO SCREEN PIPE COMPANY OF TEXAS, INC.

(Thomas W. Moore, Jr., Assignee for the Benefit of Creditors)

Under Contract No. N00197-66-C-0432

APPEARANCES FOR THE GOVERNMENT:

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OPINION BY MR. KENNEDY

This consolidated proceeding involves appeals from decisions of the contracting officer terminating the contract for default and assessing excess costs. Awarded June 9, 1966, the contract called for Emsco Screen Pipe Company of Texas, Inc., to furnish 810 shield assemblies and various quantities of fabricated parts for naval mines, in accordance with contract drawings and specifications. The award covered some 23 items for a total amount of $210,231.18.

On August 5, 1966, Emsco requested the contract be "voided without penalty" due to certain allegedly supervening circumstances. By letter of August 15, 1966, the contracting officer notified Emsco that the reasons cited for cancellation of the contract were not considered excusable, that its failure to perform was anticipated (first deliveries were due October 20, 1966) and there-

fore it was called upon to cure its failure to make progress or show cause within 10 days why the contract should not be terminated for default.[1] (Exh. N-6) In reply, Emsco requested an extension of time as a matter of right or a termination for convenience.

The contracting officer, however, found that the contractor's admitted inability to perform on time, or to show why it would be in the Government's interest to extend the time for performance, was tantamount to repudiation and abandonment of the contract. (Tr. 166-169, 176-177) Accordingly, on August 31, 1966, the contracting officer terminated the contract for default for failure to make progress so as to endanger performance within the meaning of Clause 11(a)(ii) of the General Provisions (Default). (Exh. N-11)

On September 23, 1966, Emsco noted a timely appeal from the default termination, and on October 20, 1966, made an assignment for the benefit of creditors.[2] Utilizing formal advertising procedures, a repurchase contract was awarded to the second low bidder on the original procurement on November 23, 1966, in the amount of $249,776.41. Excess costs in the amount of $40,398.66 were assessed and demand made for payment by decision of the contracting officer dated December 1, 1966. (Exhs. N-14, 15, 18) An appeal from this decision was noted on January 6, 1967. The timeliness of this appeal is not in issue. *El-Tronics, Inc.*, ASBCA No. 5457, 61-1 BCA ¶ 2961.

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[1] As to the adequacy of this notice, which is not herein challenged, see *American Marine Upholstery Company* v. *United States*, 170 Ct. Cl. 564, 571-572 (1965). (Notice to show cause or cure may rely upon knowledge in contractor's possession as to causes for failure to make progress.)

[2] In its interlocutory order of December 21, 1967, the Board found this to be a "general assignment" for the benefit of creditors and, as such, an assignment by "operation of law" exempt from the prohibitions of the anti-assignment act. *E. Harold Patterson, Receiver for the Electro Nuclear Systems Corp.* v. *United States, et. al.*, 173 Ct. Cl. 819, 823-827 (1965). On January 15, 1968, appellant-assignee filed a statement of authority under the laws of the State of Texas to act for the dissolved Emsco Corporation and to prosecute and defend claims on behalf of said corporation. (Tr. 1-5)

Appellant-assignee seeks a termination for convenience on the ground that the Government's progress failure termination was premature or that its failure to authorize promised progress payments made it impossible for Emsco to accomplish timely performance. The assignee also seeks a declaration of invalidity of the contract on the ground that at the time of award the contracting officer knew or should have known that Emsco was not a responsible bidder within the meaning of Section 1, Part 9, of ASPR. (Appellant-Assignee's Prehearing Brief, pp. 1-3) Finally, the assignee has challenged the propriety of the assessment of excess costs, principally on the ground that they had not actually been incurred. (Tr. 178-181)

Respondent claims that appellant's financial plight was not due to causes beyond its control and without its fault or negligence, and that since the pre-award determination of Emsco's financial responsibility was for the guidance, benefit, and protection of the Government, it conferred no right on appellant to avoid performance of the contract. (Respondent's Prehearing Brief, pp. 1-2)

In arriving at the findings and conclusions hereinafter set forth, the Board has given careful consideration to the testimony of the witnesses on both direct and cross-examination, and adjudged its fair worth in the light of the circumstances disclosed and the contemporaneous documentary record.

FINDINGS OF FACT

1. *The Determination of Responsibility*

Emsco Screen Pipe Company of Texas, Inc. (hereinafter Emsco) was low bidder on a formally advertised procurement for shield assemblies and fabricated parts, opened April 27, 1966. The Invitation for Bids issued March 28, 1966, and provided that the procurement was a "100% Set-Aside for Small Business." It further specifically provided that the clause entitled "Progress Payments (Nov. 1964)" was attached thereto and made a part thereof. (Exh. 1, Continuation Sheet 26) In ac-

cordance with ASPR Appendix E-501.4 the IFB further provided that:

> "The need for progress payments conforming to regulations (Appendix E, Armed Services Procurement Regulation) will not be considered as a handicap or adverse factor in the award of contracts. Bidders desiring progress payments in accordance with the Progress Payment Clause attached hereto, shall include a written request therefor in their bids, and bids including requests for progress payments will be evaluated on an equal basis with bids not including a request for progress payments. *If a bid does not contain a request for progress payment provision, the Progress Payment Clause will not be included in the contract as awarded.*" (Exh. 1, Continuation Sheet 22) (Emphasis added)

On April 26, 1966, Emsco transmitted its bid in response to the IFB accompanied by a letter which stated:

> "Enclosed please find our bid in duplicate for the subject invitation. In making this bid we take cognizance of Amendment No. 001 dated April 14, 1966. We thank you for this opportunity to submit our bid.
>
> "Yours very truly,
>
> EMSCO SCREEN PIPE COMPANY
>
> [Signed] D. E. O'Connor"

Emsco's bid did not include a written request for progress payments because, according to its president, Mr. C. E. Johnson, Emsco was under the mistaken impression that progress payments would automatically be included in any contract awarded. (Tr. 14) This apparently stemmed from Emsco's familiarity with a prior form which provided that progress payments would be

included if a box were checked, "Yes".[3] The oversight was not discovered until the individual authorized to receive bids called Emsco on the afternoon of April 27, 1966, to advise that it was the apparent low bidder. (Tr. 14-17, 171, 173) At that time Emsco's president explained that if awarded the contract, Emsco would require progress payments. The buyer instructed him to put his request in writing. (Tr. 15) This Emsco did in a letter addressed to the contracting officer dated May 2, 1966. It stated:

> "The bid set of the subject IFB which we submitted dated April 26, 1966, included a section entitled 'Progress Payments (Nov. 1964)' which states that progress payments will be made to the contractor as work progresses from time to time upon request—.
>
> "With similar bids which we have submitted to the Armed Services from time to time, it was necessary to check an appropriate box in the bid set if progress payments would be requested. In the subject bid set there was no box to check and we assumed then that progress payments would be made if requested after placement of the contract by you.
>
> "Please consider this letter as our request for progress payments in the event the contract for the subject bid is placed with us by your Department.
>
> "Yours very truly,
>
> EMSCO SCREEN PIPE COMPANY
>
> [Signed] D. E. O'Connor"

Upon receipt of this letter, the buyer noted in the lower right hand corner, "Too Late Bids Opened 4/27". (Exh.

[3] Compare *R. H. J. Corporation*, ASBCA No. 9922, 66-1 BCA ¶ 5361, at p. 25,147; reconsideration denied 66-1 BCA ¶ 5625.

N-3; Tr. 156, 162) She then filed the letter, along with other documents relating to the bids, and took no further action to call Emsco's request to the attention of the contracting officer, either before or after award. (Tr. 156-157, 173-175) The contracting officer testified that Emsco's request of May 2 was never answered and that he did not become aware of the request until he received Emsco's letter of August 5, 1966. This letter stated:

> "In reference to the above-captioned contract, the following conditions are in evidence affecting the performance on this contract:
>
> 1. We requested progress payments to be made on our bid in separate letter which was necessitated by our not interpreting the need for said special request; this letter dated 2 May 1966 and addressed to your personal attention. This has necessitated additional finance which due to tight money market existing at the present has been impossible for us to obtain, all private sources being exhausted and S.B.A. requests at present not completed.
> 2. Schedules of the delivery of raw materials from the supplier completely changed from date of bid offering in many instances tripling from 5 to 6 weeks to more than 150 days where response can be secured; those suppliers responding dwindling very rapidly.
> 3. A meeting held with the Houston banks and Mr. John P. Danko, Administrative Contracting Officer, stationed in Houston, revealed that the Houston banks were not interested and would not perform on advances requested from them on DD250 delivery receipts. This necessitated additional capital as it lengthened the period of receiving payment from the government from approximately 15 days to a minimum of 120 days, even where accelerated delivery would be made. The failure of banking institutions in Houston to handle same has placed a decided additional hardship on contract holders.

> "Taking into consideration the above facts, it will be impossible for Emsco Screen Pipe Company to meet schedules of delivery as set forth in captioned contract and unless relief is given, impossible to perform regardless of time element as additional steel prices and the fact that mills are running at full capacity makes it impossible to secure proper materials.
>
> "We, therefore, request that the contract be voided without penalty due to the fact that purchasing agent failed to comply with our request for progress payments as set forth in above-mentioned letter of request; that Houston banks have refused to handle DD250 delivery receipts, funding same for the benefit of the contractor; the lengthening of delivery periods from 15 days to from 120 to 150 days on materials vital to this contract and because of the crowded mill conditions in many instances suppliers refusing to respond on requests for materials.
>
> "It is our feeling that due to the above-mentioned conditions prevailing now and the failure of the purchasing agent to comply with our request that this contract be voided without penalty due to said conditions which are completely beyond the control of the bidder and were in no way apparent at the time of the bidding. We feel that our request is justified and that both parties are equally responsible for conditions existing." (Exh. N-4; Tr. 156-157, 160)

The contracting officer further testified that prior to August 5 and during the period May 2 to August 4, 1966, he received no other communication from Emsco with respect to progress payments. (Tr. 157-158)

In this connection, Emsco's president testified that shortly after he sent the request of May 2 he had two other conversations with the buyer but he did not say whether they involved the request for progress payments. (Tr. 18, 35-36) Prior to August 5, he made no other inquiry because he felt that he had followed instructions and thought the authorization for progress payments

would come through in due course.[4] (Tr. 35-36) Thus, despite the fact that Emsco's president felt that progress payments were "very important" and that the company's ability to perform "turned on the Government's willingness to provide progress payments", he made no attempt during the period between June 9, the date of award, and August 5, to insure their prompt authorization. (Tr. 37, 157)

In explanation of this seeming lack of interest, the assignee points out that the record shows that at the time of the pre-award survey, conducted on May 24, 1966, Emsco's president advised the Government's industrial specialist that the Company needed progress payments in order to be able to perform. (Exh. N-16, "Remarks"; Tr. 19, 20, 74) This so impressed the industrial specialist that he included a copy of Emsco's request of May 2 as a part of the pre-award survey and recommended progress payments "to insure the contractor's ability to perform." (Exh. N-5, p. 4) Furthermore, in his evaluation of Emsco's performance capability, the industrial specialist stated:

> "Contractor failed to request progress payments at the time he submitted bid package. He stated progress payment request was sent to buyer for consideration. (Attached letter of May 2, 1966 to Miss Doris Halliday) Progress payments are desired if awarded the contract." (Exh. N-16, "Remarks")

In approving award of the contract to Emsco, however, the Pre-Award Survey Board noted that the contractor had not requested Government financing of material purchases or subcontracts. (Exh. N-16, p. 1) It also noted

[4] The record shows that between May 2 and August 5 Emsco's contract administrator wrote a total of eight letters to the administrative contracting officer in Houston or the procurement contracting officer in Louisville but failed to raise any question about the delay in approving Emsco's request for progress payments. (Exh. 27 A-K) In a letter dated June 22, 1966, some six weeks after the May 2 request, the contract administrator stated that "in reviewing the bid set and contract" he noted that he had not received various forms and instructions but made no reference to the Government's failure to act on his request for progress payments. (Exh. 27-K)

the letter from Emsco of May 2, 1966, requesting authorization of progress payments for incurred costs.

For some unexplained reason, probably attributable to Emsco's lack of understanding or confusion over the distinction between partial payments, progress payments and advance payments, Emsco had advised the Government's financial analyst, during the course of the pre-award survey, that neither progress payments nor advance payments were desired. (Exhs. N-16, p. 7, N-20B; Tr. 92; Compare Tr. 32-33) Instead, Emsco had advised him that the only financial aid requested was "Prompt payments on partial shipments as completed; contract extending from September 1966 through August 1967." (Exh. N-20F; Tr. 91) The pre-award survey also shows that Emsco and its banking reference further advised the Government's financial analyst that the contract would be financed from the company's own resources and that a commercial line of credit secured by assignment of the contract would be established on or about June 9.[5] (Tr. 99-101; Exhs. N-23, N-16, p. 7) At the hearing, Emsco's president testified that he had made tentative arrangements to assign his requests for progress payments as accounts receivable to a bank other than the one to which he referred the financial analyst at the time of the pre-award survey. He could produce no documentation to support this, however, and later admitted it was possible that this arrangement did not hinge on assigning requests for progress payments as

[5] On May 31, 1966, Mr. Pace, the Assistant Vice President of the Capital National Bank, Emsco's banking reference, wrote the following letter to the Government's financial analyst:

> "It was certainly a pleasure talking with you over the phone regarding the Emsco Screen Pipe Company order. We were looking forward to being able to furnish to you the financial responsibility you requested on Mr. Johnson's order. It is entirely possible that the necessary details that we require will be answered in the near future and we will then be able to meet your requirements." (Exh. N-23)

The record further shows in a subsequent conversation Mr. Pace gave the Government's financial analyst to understand that a line of credit would probably be established for Emsco by the 9th or 10th of June. (Tr. 99-100)

accounts receivable. (Tr. 34, 38-39) Based upon the information furnished by Emsco, and his own analysis, the financial analyst concluded that even without a commercial line of credit the contractor had sufficient working capital to sustain a monthly cash flow of $23,000 to $24,000 and that this would be adequate to finance performance of the contract over its projected 9-month delivery schedule. (Tr. 101-102, 110-112)

Because the financial analyst failed to appreciate the significance of the fact that at least 60% of the accounts receivable were more than 90 days old (Tr. 117), or to ascertain that they were in any event largely uncollectible (Exh. AA-4b) or that projections of cash flow to be generated from sales of current inventory were probably unrealistic in view of the level of current indebtedness (Tr. 110), a cash balance of only $918 (Exh. N-16, p. 7) and a sharp decline in first quarter 1966 sales, it appears that the Government was mistaken in approving Emsco's financial responsibility without knowing that it had an assured line of private or Government financing to cover its working capital needs.

On the basis of the record as a whole, however, including pressure to make a timely award to the apparent low, responsive and responsible bidder (Tr. 99), we can find no abuse of discretion on the part of the contracting officer in awarding the contract to Emsco.

2. *The Default Determination*

The industrial specialist made his first post-award visit to Emsco's plant on June 22, 1966. At this time, Emsco had placed no firm orders with its materials suppliers or with any of the verified sources of supply presented during the pre-award survey. (Tr. 60-61) During this visit, the industrial specialist reviewed with Emsco's president, chief engineer and contract administrator, the engineering work required, the drawings, the contractor's materials list and a proposed schedule for their procurement. It was ascertained that the engineering staff had not completed its final evaluation of what would be required to accomplish the over-all manufacturing process. (Tr. 60) No other progress was apparent and no reference was made to any delay in commencing performance because of any act or failure to act on the part of the Government.

On July 5, 1966, the industrial specialist made a second plant visit. He again found that no firm purchase orders had been placed for the materials necessary to fabricate the critical items which were Items 1, 16, and 20. These items, and particularly Item 1, the shield assembly, were deemed critical because they required steel fabrication and because the lead time on this material at the time of bid and award was 100 to 120 days (Tr. 55, 68-69), whereas first deliveries were due approximately 130 to 140 days after award. (Exh. N-1, Award, p. 3) The principal excuse offered was that the contractor was doing further research and evaluation before placing orders. Reference was also made to the fact that Emsco had not heard about its request of May 2 for approval of progress payments. There was no indication, however, that this was in any way impairing Emsco's ability to make progress. (Tr. 62)

When the industrial specialist inquired as to why the contractor had not placed firm purchase orders for the other 20 contract items, all of which were considered to be shelf items, he was advised that they had not been ordered because the contractor "didn't know whether he would be able to pay for them or not." (Tr. 63) When the industrial specialist pointed out that upon receipt these items could be immediately shipped and payment received from the Government in less than 30 days under the acceleration provisions of the contract, he met the same response. Emsco's credit position had apparently deteriorated to the point where its suppliers would ship it only on a C.O.D. basis. Despite this, the industrial specialist did not think that progress was being sufficiently endangered to require action by the contracting officer. No report of this or of his earlier visit was made to the contracting officer. (Tr. 72-73, 170)

The third plant visit was made on August 1. At this time it appeared that again no progress had been made toward purchasing any of the shelf items or materials for the critical items because of Emsco's inability to

assure payment to its suppliers. (Tr. 64) Furthermore, the industrial specialist was told that no monthly production progress report had been made for the month of July as no progress worth reporting had been made. (Tr. 66)

As a result of this visit, the industrial specialist concluded that progress was definitely being endangered and immediately moved to set up a meeting between the contractor and the administrative contracting officer. (Tr. 65) At this meeting, on August 3, 1966, Emsco was advised that the Government did not think it could perform the contract. (Tr. 46) Emsco apparently did not deny this, but as an excuse for its nonperformance claimed that in addition to its financial difficulties and the Government's failure to authorize progress payments the price of steel had increased to the point where purchases of steel materials needed for performance would result in a loss on the contract.[6] (Tr. 135-137) Emsco also pointed out that an increase in lead time on steel materials, which the industrial specialist agreed amounted to 50 days over the lead time at the time of bid and award, made it impossible to meet the contract delivery schedule. (Tr. 68-69)

As a result of this meeting Emsco sent the aforementioned letter, dated August 5, 1966, to the contracting officer in Louisville, Kentucky, with a copy to the administrative contracting officer (hereinafter "ACO") in Houston. Emsco pointed out the Government's failure to act on its request for progress payments, its inability to obtain private financing,[7] and the increase in lead

[6] On August 3, 1966, the Steel Industry announced a 2.1% increase in the prices of most steel products, effective August 10. This increase applied even to orders placed before the effective date of the increase because of the industry policy of charging the price in effect at the time of shipment rather than at the time of placement of an order. New York Times Index, 1966, p. 1080, Col. 3.

[7] As noted, Emsco, at the time of the pre-award survey, advised the Government that it expected to have a line of credit with the Capital National Bank. (Exhs. N-20A, N-23, N-16; p. 7; Tr. 100-101) At the hearing Ensco's president made no reference to the Capital National Bank. Instead, he testified that he had made tentative arrangements to obtain working capital from the Medical Center National Bank of Houston. (Tr. 19-20). He could not say that the delay in securing authorization for progress payments precluded obtaining a binding commitment from the Medical Center National Bank. (Tr. 34, 38-39) Nor did he explain why the expected line of credit with the Capital National Bank never materialized.

time on raw materials. It concluded that "unless relief is given" it would be "impossible to perform regardless of time element" because of the increase in steel prices and the shortage of available sources of supply for the steel needed. Emsco requested that the "contract be voided without penalty" because it felt that "both parties are equally responsible for conditions existing."

The contracting officer interpreted this letter as indicating Emsco was probably not going to perform. (Tr. 166) But in order to give the relief requested the contracting officer immediately authorized approval of an amendment to the contract to include progress payments. (Tr. 42, 160-161; Exh. N-1, Mod. P003) This was accomplished on August 11, 1966.

In the interim, the contracting officer received the report of the ACO and the industrial specialist concerning the plant visit of August 1 and the meeting of August 3. (Exh. N-5) This report, dated August 8, shows that the reason for Emsco's inability to procure materials was the fact that its suppliers would sell it only "C.O.D. or thirty days net", whereas its "lapsed time" in receiving payment from the Government for delivered items was expected to be "120 to 150" days. The report of the ACO and the industrial specialist further stated that from the standpoint of time the contractor could still meet the delivery schedule on shelf items[8] but that delivery on the critical items had advanced from 60 days at the time of bid in April[9] to 120 to 150 days in August.

[8] First deliveries on these items were due in October, November, and December, 1966, and February 1967.

[9] The record contains no explanation for the discrepancy between this estimate of lead time and the industrial specialist's testimony that at the time of bid his estimate was 100 to 120 days. (Tr. 55, 68-69).

(Exh. N-5) This report further stated that delivery on Item 1, due October 20, 1966, could not be accomplished before January 20, 1967.[10] The report of August 8, a subsequent plant visit report by the industrial specialist dated August 24, 1966, and a letter from the ACO dated August 25, 1966, recommended a 60-day extension and/or a termination of the contract for the convenience of the Government because of failure to approve progress payments and the increase in lead time on the critical items. (Tr. 25, 54, 69-70; Exhs. N-5, N-9, N-10)

Because of the contracting officer's doubt as to whether the reasons cited in Emsco's letter of August 5 for failure to commence performance or make progress were excusable, he issued a 10-day show cause or cure letter on August 15, 1966, four days after amending the contract to authorize progress payments. (Exh. N-6) Before receipt of the show cause or cure letter, Emsco had sent a letter dated August 17, 1966, acknowledging receipt of the modification authorizing progress payments but stating that it was of "no help" as the lead time on materials had increased to 200 days or more. Emsco also requested a termination for convenience "at no penalty to the contractor". (Exh. N-7; Tr. 167) On August 23 Emsco answered the show cause or cure letter by asking for an extension of time to December 9 to commence performance because of the delay in approving progress payments or for a convenience termination but made no proposal or suggestion for curing its existing failure to make progress or otherwise indicating that it was ready, willing and able to perform.[11] (Exh. N-8; Tr. 168, 175) Because of Emsco's apparent lack of interest in committing itself to a revised delivery sched-

[10] The unit price on this item was $108,305, or 51.52% of the total contract price.

[11] In view of the assignment for the benefit of creditors made on October 20, 1966, we cannot find that on the date set for performance, or any claimed extension thereof for the Government's delay in authorizing progress payments, Emsco was ready, willing and able to perform. Compare *Mid-West Construction, Ltd.* v. *United States*, 181 Ct. Cl. 774, 789 (1967); *National Movers Co., Inc.* v. *United States*, 181 Ct. Cl. 419, 425 (1967).

ule, one that would take into account the necessity for an increase in lead time, because of its failure to place orders for even the shelf items during June, July, or August, and because of its statement that the authorization for progress payments was of "no help", the contracting officer concluded that Emsco's failure to make progress was endangering performance of the contract and that the Government's delay in approving progress payments did not justify extending until December 9 Emsco's time to commence performance. (Tr. 175-176)

For these reasons, and because of a continuing requirement for the contract items, the contracting officer determined to disregard the August 8 report from the ACO and the industrial specialist, as well as the report of the industrial specialist of August 24 and the ACO's letter of August 25 recommending a 60-day extension or termination of the contract for the convenience of the Government. (Tr. 167) Accordingly, on August 31, 1966, the contracting officer terminated the contract in its entirety for default, for failure to make progress so as to endanger performance. (Exh. N-11)

Evidence offered by the appellant-assignee relating to Emsco's unsuccessful efforts to obtain a $50,000 working capital loan from the Small Business Administration, during August 1966, shows (Tr. 32; Exhs. AA4-7), that at this time Emsco's debt to net worth ratio was 5.4 to 1. (Exh. AA-7a) It also shows that Emsco's application for a Small Business Administration loan was denied on August 26, 1966, five days before the termination for default, because of:

1. Lack of reasonable assurance the loan could be repaid from profits.
2. Lack of working capital after the loan. In this connection the Small Business Administration noted that "Considering that approximately $35,000.00 of the receivables are questionable as to collectibility, and the aging of the payables, the amount of this loan does not appear to be adequate, to be able to handle the volume of business projected. * * *" (Exh. AA-4b)
3. Unfavorable debt to net worth ratio. (Exhs. AA-4b, AA-6a)

The Small Business Administration found that Emsco's past operating record showed a trend toward increasingly heavy losses. Thus, on October 5, 1966, it noted that "Operations for 1963 resulted in a net loss of $21,-785, for 1964 a net loss of $95,997, for 1965 a net loss of $85,951, and for the current year to date, according to your latest Profit and Loss Statement submitted, a net loss of $54,561. We do not feel that the loan requested [which at this time, October 1966, was $100,000] would make enough improvement in your operations to reverse the operating losses you have sustained in the past." (Exh. AA-7a)

On October 20, 1966, Emsco made an assignment for the benefit of creditors. This was the date initial deliveries were due under the contract delivery schedule. On October 31, 1966, appellant-assignee's accountant furnished him with the results of a survey made to determine whether "the creditors would be better served by continuing the business or liquidating its assets." The accountant's conclusion was that "the best interests of the creditors would be served by releasing all personnel except productive shop employees, pending completion of the work in progress, particularly the Mid-Continent Supply Company order, and at that time to shut down completely and liquidate the assets in the most advantageous manner." (Exh. AA-3a)[12]

We find that at the time of termination Emsco was in fact financially incapable of performing the contract and that this incapacity had in fact endangered performance of the contract. We further find that the causes for Emsco's incapacity were not beyond its control and without its fault and negligence.

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[12] The assignee's accountant further reported that:

"The drop in sales from approximately $20,000 per month as shown on the 1965 Income Tax Return to approximately $9,000 per month in 1966, as reflected by the books is not explained. However, with the multiple interests of Mr. Johnson, it occurs to us that there is a possibility of diversion of Emsco Sales to some other interest."

3. *The Reprocurement*

The reprocurement was effected under formal advertising procedures, and the repurchase contract promptly awarded to the low bidder among the seven bids received from the sixty-eight sources solicited. (Tr. 182-183; Exhs. 18A-C) The award, made on November 23, 1966, went to the company that was the second low bidder on the original procurement. The repurchased items and their quantities were identical to those specified in the original contract. (Tr. 184-185) The delivery schedules under both the original and the repurchase contracts covered a 9-month period with a 4-month lead time. The total amount of the repurchase contract was $249,776.41. Excess costs as originally demanded totaled $40,398.66. (Exh. N-15) At the time of the hearing the Government had not accepted and paid for all of the repurchased items. For this reason, and by stipulation of the parties, the record was left open for receipt of evidence of actual payment of excess costs. (Tr. 187-190, 194-195) Compare the Board's action in *American Supply Co.*, ASBCA No. 13668, 69-1 BCA ¶ ——.

After the hearing the Board received in evidence in this matter repurchase vouchers 1 through 45 as Exhibit N-19, and the pleadings, where necessary, were deemed amended to conform to the proof. This evidence shows that the actual amount of the excess costs totaled $40,607.13.

We find that the repurchase was made within a reasonable time, that the repurchase price was obtained after reasonable competition, and that the price so obtained was reasonable. For this reason, we conclude and find that the Government has satisfied its duty to mitigate damages.

DECISION

The facts upon which our decision must turn show that primarily on the basis of assurances received from Emsco, and its banking reference, with respect to the availability of a commercial line of credit, but secondarily on the basis of a mistaken understanding of the viability

of Emsco's working capital position, the Government determined Emsco to be financially capable of performing the contract. When, subsequent to award, and for reasons now apparent, but not explained in the contemporaneous record, the commercial line of credit failed and the total inadequacy of Emsco's working capital position was disclosed, the contracting officer, after due notice, terminated the contract for failure to make progress. Shortly thereafter, Emsco made an assignment for the benefit of creditors and went out of business. Repurchase action was seasonably accomplished and demand made for the payment of approximately $41,000 in excess costs.

Appellant-assignee, as the substituted party in interest, vigorously asserts that because the Government should have known that Emsco was not financially responsible at the time of award, the award was invalid and Emsco's creditors are not liable for the consequences of the Government's error. Secondarily, it is claimed that the default for failure to make progress was premature since Emsco was entitled to an extension of time to commence performance due to the Government's delay in authorizing progress payments, or that in any event, this delay made timely performance physically impossible. The assignee also challenges the propriety of the repurchase action.

We find the default termination for progress failure was correct, and that in view of Emsco's unmistakable desire to avoid its obligation under the contract it would have been useless and vain to grant an extension of time for any delay by the Government in approving progress payments. We further find that Emsco's failure to insure adequate financial resources at the time of award was a risk of nonperformance it assumed in submitting its bid and that any mistake on the part of the Government in evaluating its financial capability neither invalidated the contract nor excused its failure to make progress so as to endanger performance of the contract. We also find that Emsco's inability to incur costs reimbursable under the progress payments clause was not due to any fault of the Government. For these reasons, we are unable to

find that the failure to authorize progress payments impaired Emsco's financial capability. Accordingly, we have no occasion to consider the applicability of the rule that mutual fault, *Vector Plastics Corporation*, ASBCA No. 9552, 65-2 BCA ¶ 5286, pp. 24,878-879; *Dynaelectron Corporation-Pacific Division*, ASBCA No. 11766, et al., 69-1 BCA ¶ 7595, p. 35,278, or an improper withholding of past due and current progress payments by the Government may excuse a default. *R. H. J. Corporation*, *supra*, Note 3; *United States* v. *Lennox Metal Manufacturing Co.*, 225 F. 2d 302 (2d Cir. 1955).

It is true, of course, that prior to award the contracting officer was required to find that the low, responsive bidder had adequate financial resources to perform the contract. *Lieco, Inc.*, ASBCA No. 13681, 69-1 BCA ¶ 7489; ASPR 1-902, 1-904.1, 1-905.2. We have always taken the position, however, that a good faith error on the part of the Government in making this determination is not an act of the Government in its contractual capacity that excuses nonperformance under clause (c) of the Default article. Compare, *Security Signals, Inc.*, ASBCA No. 4634, 58-2 BCA ¶ 2045, pp. 8590-8591, with *Southland Manufacturing Corporation*, ASBCA No. 10519, 67-1 BCA ¶ 6128, pp. 28,378-397; *American Canvas Products, Inc.*, ASBCA No. 10749, 66-1 BCA ¶ 5635, p. 26,317; *Valveair, Aircraft Division Abbotwares*, ASBCA No. 8322, 1964 BCA ¶ 4177, pp. 20,234-335, *reconsideration denied*, 1964 BCA ¶ 4509; *Polytronic Research, Inc.*, ASBCA No. 5918, 1962 BCA ¶ 3548, pp. 17,998-999; *Trand Plastics Company*, ASBCA No. 3708, 57-1 BCA ¶ 1186, pp. 3299-300; Speidel, *Financial Inability and the Default Termination of Defense Supply Contracts; A Small Business Case Study*, 44 Minn. L. Rev. 1055, 1060-66, 1085-90, 1094-95 (1960). With respect to the instant factual context, Speidel, *supra*, states, and we agree, that:

> "The Government's initial determination of 'responsibility' is not an act which will excuse a subsequent default, for a defective determination does not breach any contractual duty to the prospective contractor. The Government determines financial re-

> sponsibility prior to award in order to protect its own interest. Consequently, financial resources which were deemed adequate for a determination of responsibility may prove inadequate when the question of excusability arises; and the fact that the contract was awarded is not conclusive evidence of the contractor's financial ability to perform at the time of award. The contractor cannot rely upon a determination of financial responsibility, but must re-establish the fact of adequate financing in excusability proceedings before the ASBCA." Id. at 1089-1090.

This is not to say that under appropriate circumstances this Board may not find that the action of a contracting officer in determining the financial or other responsibility or responsiveness of a bidder so exceeded the regulatory and statutory limits of his authority or was so grossly erroneous as to invalidate the award. In a line of cases beginning with *John Reiner & Company* v. *United States*,[13] however, the Court of Claims, and also the Comptroller General,[14] have held that with respect to determinations of responsibility and responsiveness a contracting officer has authority, when acting in good faith and in a manner reasonable under the circumstances, to make a valid award to an otherwise unqualified bidder. *Mid-West Construction, Ltd.* v. *United States*, 181 Ct. Cl. 774, 782 (1967); *Otis Steel Products Corporation* v. *United States*, 161 Ct. Cl. 694, 699-700 (1963). Thus, the Court of Claims has specifically held that if a determination with respect to reliability and dependability is made in good faith and is reasonable under the applicable law and regulations, it should be upheld. *Warren Brothers Roads Company* v. *United States*, 173 Ct. Cl. 714, 720-721 (1965). See also *Coastal Cargo Company, Inc.* v. *United States*, 173 Ct. Cl. 259 (1965); *Brown & Son Electric Company* v. *United States*, 163 Ct. Cl. 465 (1963).

On the other hand, this Board and the Court of Claims have not hesitated to declare a contract invalid when

[13] 163 Ct. Cl. 381 (1963); *cert. denied*, 377 U.S. 931 (1964).

[14] 44 Comp. Gen. 221 (1964); 46 *id.* 275 (1966).

faced with clear and convincing evidence that no binding contract came into existence, or that in making the award the contracting officer exceeded his statutory authority or grossly disregarded procedures designed to preserve the integrity of the competitive bid system. *Ordnance Parts & Engineering Co.*, ASBCA No. 12820, 68-1 BCA ¶ 6870; *Prestex, Inc.*, ASBCA No. 6572, 61-1 BCA ¶ 2937; *Herbert Schoenbrod, As Trustees, Etc.* v. *United States*, Ct. Cl. No. 91-67, Slip Op. p. 8 (decided May 16, 1969). Compare, *ITT Defense Communications Division, Defense-Space Group*, ASBCA No. 13420, 69-1 BCA ¶ 7548.

But this is certainly not a case where interference with the broad discretion conferred upon the contracting officer to determine financial responsibility is warranted. On the contrary, the record clearly shows that it was Emsco's misrepresentations with respect to the imminent availability of a commercial line of credit and its failure to disclose the latent infirmities in its working capital structure that misled both the Government's financial analyst and the contracting officer to believe that Emsco possessed the financial capability necessary to perform the contract. Thus, it cannot be said that at the time of award the contracting officer abused his discretion in finding that Emsco had the apparent ability to perform the contract.

Turning to the propriety of the default termination and the excusable causes alleged, we find that the Government's two-month delay in authorizing progress payments was totally unrelated to Emsco's failure to make progress.[15] It is clear that because of Emsco's lack of working capital it was incapable of incurring the costs incident to its qualification for progress payments. Thus, even if they had been authorized, there is no reason to

[15] The Government concedes that Emsco's failure to indicate its need for progress payments in its bid did not disqualify it from receiving such authorization subsequent to award. ASPR, Appendix E-210.1.

believe that Emsco could have accrued on its books costs eligible for reimbursement.[16]

Furthermore, even if progress payments had been authorized and if Emsco had submitted a request for reimbursement for in-house engineering and other allocable costs, it seems clear, under Emsco's present admissions, that the contracting officer would have been justified in withholding payment under the Suspension of Payment provisions of the progress payments clause on the ground that Emsco's failure to make progress and unsatisfactory financial condition were endangering performance of the contract. Compare *Astrotherm Corporation*, ASBCA Nos. 8144, et al., 65-2 BCA ¶ 5248, at 24,722. For these reasons, we find no basis in fact or law for concluding that the Government's failure to authorize progress payments prior to August 11, 1966, in any way contributed to or impaired Emsco's financial ability to commence performance of the contract, or excused its failure to make appropriate progress toward performance of the contract. *Schutter Microwave Corp. (Isadore Cherno, Trustee in Bankruptcy)*, ASBCA No. 9786, 66-1 BCA ¶ 5473, at 25,648-649.

Because the termination was for failure to make progress, the Government had the burden of establishing that at the time of termination the contractor was in fact incapable of performing the contract. As to this, the facts show that after authorization of progress payments Emsco advised they were of "no help" and that in any event performance within the contract delivery schedule was impossible. Certainly, if the authorization of progress payments in August was of no help with respect to financing performance, and if, as Emsco stated and represented, it was caught in a cost-price squeeze on raw materials that would insure a loss on performance, and

[16] Progress payments are periodic advances of money to a contractor after he has commenced performance and incurred costs. ASPR Appendix E-106. Incurred costs are those identified through the accrual method of accounting and reporting. Invoices covering materials are considered to include incurred costs only to the extent that the materials have been delivered and paid for by the contractor. ASPR Appendix E-509.5, F-200.1195.

if, as the Government knew, Emsco had no working capital or other financial resources available to finance performance, there was no basis for any conclusion other than that Emsco's past failure to make progress was a prologue to a continuing incapacity of an increasingly serious character.

We have long and consistently held that a demonstrated likelihood of future inability to perform has the same consequences as an express repudiation and that either constitutes an anticipatory breach warranting termination for default under paragraph (a) (ii) of the Default article.[17] See, *Aircraftsmen Company, etc.*, ASBCA No. 3592, et al., 58-1 BCA ¶ 1667, at 6261-6262; *American Canvas Products, Inc.*, ASBCA No. 10749, 66-1 BCA ¶ 5635, at 26,317. Compare *James E. Kennedy, Trustee, et al.* v. *United States*, 164 Ct. Cl. 507, 513-514 (1964). See also Speidel, *Default for Failure to Make Progress, Government Contractor Briefing Paper*, 64-5, at 4-6 (October 1964).

Since it is well established that a failure to make progress brought on by a lack of working capital resulting from the unexplained failure of a bank to extend a line of credit is not excusable, *Security Signals, supra, Schutter Microwave Corp., supra*, little need be said as to the claimed impropriety of the default action on the ground that the advance in lead time on raw materials made performance in accordance with the original contract delivery schedule impossible. Our study of this record persuades us that Emsco could never have performed. The record also shows that before bidding and at the time of award Emsco had not made reasonable arrangements for financing performance of the contract through a commitment from a private financial institution, nor did

[17] The correctness of the judgment to terminate was confirmed when Emsco made its assignment for the benefit of creditors on the date initial deliveries were due under the contract. The evidence also shows that in August Emsco's working capital was insufficient to warrant a Small Business loan (Exh. AA-4a) and that by the end of September its liabilities exceeded its assets by approximately $120,000. (Exh. AA-3b) A contractor's breach of its implied obligation not to become financially incapable of performance is itself an anticipatory breach. *The Pennsylvania Exchange Bank, et al.* v. *United States*, 145 Ct. Cl. 216, 223 (1959).

it have adequate private resources, in the light of business custom and practice, to finance the commencement of performance or the incurrence of costs reimbursable under the progress payments clause. See *Washington Scientific Industries, Inc.*, ASBCA No. 9384, 65-1 BCA ¶ 4743, at 22,557. It is well settled that a financial weakness existing at the time of bid and award that results in endangering performance is not an excusable cause for failure to carry out the contract. *Office Equipment Company*, ASBCA No. 4648, 58-1 BCA ¶ 1717, at 6546; *R. P. Bennett Company, Inc.*, ASBCA No. 3738, 57-1 BCA ¶ 1262, at 3814-3815; Speidel, *supra*, 44 Minn. L. Rev. at 1078-1094.

And while supervening financial or other difficulties encountered after award that render performance "commercially senseless" (We are indebted for this phrase to the perceptive opinion by Judge Skelly Wright in *Transatlantic Financing Corporation* v. *United States*, 363 F.2d 312, 315 (D. C. Cir. 1966)), not merely more expensive, are excusable, we find that, as in the case of the Government's delay in authorizing progress payments, neither the increase in the price of steel nor the extension of the lead time on raw materials were the proximate cause of Emsco's *de facto* repudiation of the contract. Compare *Paromel Electronics Corporation*, ASBCA No. 4025, et al., 57-2 BCA ¶ 1503, reconsideration denied, 58-2 BCA ¶ 1839, with *Fabricated Products, Inc., et al.*, ASBCA No. 9631, 1964 BCA ¶ 4450, p. 21,418.

With respect to the propriety of the repurchase action, it is well settled that, since the Government has shown that reprocurement was effected with reasonable dispatch by the use of competitive formal advertising procedures, it satisfied its burden of showing it mitigated damages, *American Waterproofing Corporation*, ASBCA No. 922, April 28, 1953, p. 6; *Atlantic Fish & Oyster Co.* v. *United States*, 126 Ct. Cl. 892, 894 (1953), and shifted to appellant-assignee the burden of showing that the excess costs thus incurred could have otherwise been avoided. See, *James A. Connor, As Trustee Etc.*, ASBCA No. 10356, et al., 68-2 BCA ¶ 7409, p. 34,451. Appellant-assignee has failed to discharge this burden. Accordingly, we find that by the terms of the contract the Government is entitled to recover excess costs in the amount of $40,607.13.

For these reasons, both appeals are denied.

Dated 29 May 1969.

/s/ Joseph B. Kennedy, Jr.
JOSEPH B. KENNEDY, JR.
Member of Division No. 8,
Armed Services Board of
Contract Appeals

[Signatures continued]

I Concur

/s/ Rudolf Soberheim
RUDOLF SOBERHEIM
Member of Division No. 8,
Armed Services Board of
Contract Appeals

I Concur

/s/ Richard C. Solibekke,
RICHARD C. SOLIBEKKE,
Chairman,
Armed Services Board of
Contract Appeals and
Member of Division No. 8

I Concur

/s/ William J. Kelly
WILLIAM J. KELLY, Colonel,
USAF
Member of Division No. 8,
Armed Services Board of
Contract Appeals

I Concur

/s/ Joel P. Shedd
JOEL P. SHEDD,
Vice Chairman
Armed Services Board of
Contract Appeals and
Member of Division No. 8

I certify that the foregoing is a true copy of the decision and opinion by the Armed Services Board of Contract Appeals in ASBCA Nos. 11917 and 12184, appeals of Emsco Screen Pipe Company of Texas, Inc. (Thomas W. Moore, Jr., Assignee for the Benefit of Creditors), rendered in conformance with the Board's Charter.

Dated: 18 June 1967

GEORGE L. HAWKES, Recorder

/s/ George L. Hawkes
Armed Services Board of
Contract Appeals

LIST OF CREDITORS

NAME	AMOUNT OF CLAIM
Behring's Bearing Service, Inc.	$ 123.38
Brance-Krachy Co., Inc.	130.06
Briggs-Weaver	36.72
Burmass Publishing Co.	161.00
Carpenter Steel Company	3,490.78
Coulson, Edward	3,000.00
Dodge, F. W. Company	130.00
Decker Machine & Tool Co.	2,905.54
Dun & Bradstreet, Inc.	272.00
Frazer-Torbet	2,010.00
General Supply & Equipment Co.	139.20
Gerrard, A. J.	1,734.03
Goodwin & Carter, Inc.	308.13
Gulf Coast Oil Directory	65.00
Gulf Oil Corporation	268.16
Gulf Publishing Co.	972.00
Humble Oil & Refining Co.	501.93
Halliburton Co.	65.70
Houston Belt & Terminal Railway	82.50
Houston Power & Equipment Co.	86.60
Houston Saw & Knife Works, Inc.	26.22
Industrial Diamond Products Co.	47.54
Industrial Towel & Uniform Co.	265.79
Instant Reproduction Co.	129.89
Jacobe-Pearson Ford	6.08
Larkin Packer Division	1,889.33
Layne & Bowler Co.	888.50
Lipton Staple Co.	34.67
Magnolia Welding Supply Co.	240.51
Metal Goods Corporation	153.74
Norvell-Wilder Supply Co.	440.00
Paris, Henry H., Distributor, Inc.	812.32
Peden Iron & Steel Co.	1,597.49

NAME	AMOUNT OF CLAIM
Pipe Distributors, Inc.	145.22
Pincoffs, Maurice, Co.	586.57
Reader's Wholesale Distributors	109.65
Sam Reisfield & Son	79.66
Remington Office Machines	449.19
Republic Supply Co.	2,308.25
Rex Supply Corporation	17.78
Richardson's Rubber Stamp Works	156.01
Rothschild Pipe & Supply Corporation	309.12
A. P. Ruth & Co.	79.00
Joseph T. Ryerson & Son, Inc.	565.11
Skyvara Foundry	681.51
Southern Microfilm Corporation	141.54
Southwestern Steel Products Co.	36.14
Sunray DX Oil Co.	388.55
Texas Iron Works	1,598.10
Tube Sales	40.81
United Oilfield Supply Co.	4,356.02
University Press	161.32
Van Dusen Aircraft Supplies	33.59
Vinson, Elkins, Weems & Searls	2,210.24
Vinson Supply Co.	27,560.15
Walker-Kurth Lumber Co.	168.53
Wessendorff, Nelms & Co., Inc.	208.33
Western Well Screen Co.	1,270.79
Wilson Supply Company	1,488.68
Baxtul (Export) Limited	429.50
Century Papers, Inc.	72.64
TOTAL	$68,758.91

SUPREME COURT OF THE UNITED STATES

No. 74-687

UNITED STATES, PETITIONER

v.

THOMAS W. MOORE, JR., ETC., ET AL.

ORDER ALLOWING CERTIORARI—Filed February 18, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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